United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

77-1044

To be argued by
V. THOMAS FRYMAN, JR.

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1044

UNITED STATES OF AMERICA,

Appellee,

—v.—

LEON MAYER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1044

UNITED STATES OF AMERICA,

Appellee,

—v.—

LEON MAYER,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Leon Mayer appeals from a judgment of conviction entered on January 17, 1977, in the United States District Court for the Southern District of New York, following an eight day trial before the Honorable Charles H. Tenney and a jury.

Indictment 75 Cr. 363, filed on April 11, 1975 (D. App. 8-22),* in count one charged Leon Mayer and six others—Ivan Alan Ezrine, Joseph Lichtman, Murray Lichtman, Edward Vassallo, Lawrence Goral, and Anthony L. Greco, Jr.—with conspiracy to sell and distri-

* "App." refers to pages of the Government's Appendix; "D. App." refers to pages of defendant Mayer's Appendix; "Br." refers to pages of Mayer's Brief; "Tr." refers to pages of the trial transcript; and "GX" refers to Government Exhibits received in evidence.

bute shares of common stock of Minute Approved Credit Plan, Inc., ("MACP") to members of the public while fraudulently concealing and falsifying material information required to have been fairly and truly disclosed, in violation of Title 18, United States Code, Section 371. Count one also charged that the defendant conspired to violate several other federal statutes, and counts two through eighteen of the indictment charged the same defendants with substantive violations of certain of those other statutes.*

Each defendant other than Mayer pleaded guilty to count one of the indictment prior to trial.**

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* Count one charged that the defendants conspired to violate three other sections of Title 18: the mail fraud statute, Section 1341; the wire fraud statute, Section 1343; and the statute prohibiting false statements to an agency of the United States, Section 1001. Count one further charged that the defendants conspired to violate the registration and antifraud provisions of the Securities Act of 1933, Sections 77e, 77q and 77x of Title 15 of the United States Code, and the antifraud provisions of the Securities Exchange Act of 1934, Sections 78j and 78ff of Title 15 of the United States Code, as well as Regulation 10b-5 prescribed by the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5.

No registration statement was filed pursuant to Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e, with respect to the offering of MACP common stock. The offering was made under an exemption from registration provided by Regulation A, 17 C.F.R. §§ 230.234-63, prescribed by the SEC pursuant to Section 3(c) of the 1933 Act, 15 U.S.C. § 77c(c). The Government claimed that the exemption was not applicable because the offering circular did not satisfy the requirements set forth in Regulation A, in that it did not disclose certain matters required by the Regulation to have been disclosed. (Tr. 916-17). Those items were similar to the material information charged to have been concealed and falsified in the fraud counts.

** Ezrine pleaded guilty on August 12, 1975; Vassallo on September 2, 1975; Greco on October 26, 1976; Goral on November 3, 1976; and Joseph and Murray Lichtman on November 12, 1976.

Trial of Mayer commenced on November 15, 1976, following the District Court's denial of three motions by him to dismiss the indictment. On November 18, 1976, at the close of the Government's case, the Government consented to Mayer's motion to dismiss five of the substantive counts. On November 24, 1976, the jury returned a verdict of guilty on count one, the conspiracy count, and each of the remaining 12 substantive counts.

On January 17, 1977, Judge Tenney sentenced Mayer to a term of imprisonment of two months on count one and probation for two years on each of the substantive counts. Mayer was released on bail pending appeal.

Statement of Facts

A. The Government's Case

1. Summary

In 1972, the New York Stock Exchange firm of A. C. Kluger & Co. served as the underwriter for a public offering of 50,000 shares of MACP common stock at a price of $5 a share. Defendant Leon Mayer was the co-manager of the 47th Street office of A. C. Kluger & Co., and, while technically not a partner of the firm, in practice he functioned as one.* In its direct case, the

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* A. C. Kluger & Co. in November, 1970, merged with Kern Securities. The office of A. C. Kluger & Co. at 47th Street had previously been a Kern office. (Tr. 330). Leon Mayer had been a partner at Kern, but he did not immediately become a partner in the Kluger firm. (Tr. 331). On cross-examination, Mayer explained that his admission to the firm as a partner had been delayed because of a technical New York Stock Exchange requirement; that he functioned as a partner; and that on occasion he presented himself to customers as a partner of A. C. Kluger & Co. (Tr. 741-42).

Government offered proof that approximately half of the total sales of stock in the MACP underwriting were fraudulent: the stock was purchased in nominee names with funds provided by a few individuals who were immediately repaid from the proceeds of the offering. The Government also offered evidence that Mayer accepted a secret cash underwriting commission of almost $20,000 which was not disclosed in the offering circular.

The Government's direct case was straight-forward and brief. Twenty-two witnesses testified over a three and one-half day period. Four of the witnesses—Joseph Lichtman, Murray Lichtman, Anthony L. Greco, Jr., and Lawrence Goral—were co-defendants who had previously pleaded guilty to the conspiracy count of the indictment. Three other witnesses—Leon Rafalowicz, Sam Weinreb, and Irwin Schlacter—had been participants in certain transactions involved in the fraudulent stock offering. Three witnesses were related to A. C. Kluger & Co.: Alan C. Kluger, the firm's president; Sheila Murray, the employee responsible for preparing papers in connection with underwritings by the firm; and Leonard R. Glass, an attorney who represented A. C. Kluger & Co. at the closing of the MACP offering. Finally, the Government presented testimony from 12 nominees who supposedly had purchased some of the MACP stock from A. C. Kluger & Co. but, in fact, had not.

2. The $20,000 Payment

Joseph Lichtman and Murray Lichtman each had owned 50 percent of the stock of MACP—a furniture finance company located in Brooklyn, New York. (GX 63). Prior to November, 1971, Joseph Lichtman had made several unsuccessful attempts to make a public offering of MACP stock. (Tr. 150, 215).

In November, 1971, Murray Lichtman spent the Thanksgiving holiday at the Caribbean Hotel in Miami, Florida. While there he met Sidney Stein and told him about the previous unsuccessful efforts to sell stock in his company. Stein suggested that Murray Lichtman talk to Leon Mayer at A. C. Kluger & Co. when he returned to New York. (Tr. 150-51).

Murray Lichtman visited the 47th Street office of A. C. Kluger & Co. a week or so later and discussed MACP with Mayer. (Tr. 152). He had a second meeting with Mayer at that office a few days later which was also attended by Stein. On that occasion Lichtman agreed with Stein and Mayer to make a secret payment to them of $.80 a share for every share of MACP stock which they were able to sell. (Tr. 156). Subsequently Stein insisted that Murray Lichtman pay this undisclosed commission in advance. (Tr. 157). Lichtman resisted, and eventually they reached a compromise: Lichtman would make an escrow deposit with Leon Rafalowicz, a diamond merchant located on 47th Street near the Kluger office. (Tr. 157). Murray Lichtman obtained $20,000 from his brother, Joseph Lichtman, and left the money with Rafalowicz. (Tr. 108, 121, 162-63, 218; GX 34). Lichtman also discussed with Mayer the preparation of a receipt to be signed by Rafalowicz (Tr. 164), and Mayer took the receipt to Rafalowicz for his signature (Tr. 109-10).*

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* The receipt stated:

"In order to sell Minute Approved Credit Plan, Inc., eighty cents per share cash has been put up in escrow with Leon Rafalewitch [*sic*]. Upon sale of shares and upon receipt of a certified check by Minute Approved Credit Plan, Inc. for the sale of the stock, the cash is to be released to Leon Mayer and Sidney Stein." (GX 35).

Later, Mayer asked Murray Lichtman to get the money from Rafalowicz and give it to him. After getting Stein's approval, Rafalowicz gave the $20,000 cash to Mayer and Murray Lichtman. Mayer took $1,600 from the stack of bills and handed it back to Rafalowicz. Mayer kept the remainder of the $20,000. (Tr. 122-23, 164-66).*

3. The Phony Stock Sales

At the same time that Mayer and Stein were attempting to push the MACP stock, Joseph Lichtman decided to make additional efforts to sell MACP shares. At a pancake house in Queens, New York, he met Ivan Ezrine and Michael Hellerman. (Tr. 220). Hellerman agreed to sell 25,000 MACP shares at $5 a share, for a total price of $125,000. In return, Joseph Lichtman agreed to "loan" Hellerman $160,000 from the proceeds of the underwriting and to pay him a commission for each share. (Tr. 222-23).

Hellerman contacted Anthony L. Greco, Jr., Lawrence Goral and Sam Weinreb, and they agreed to exchange certified checks for checks to be provided by Hellerman. (Tr. 26-27, 59, 70). Hellerman told Greco and Goral that they would each receive 9,000 shares of MACP stock—at no cost— which would later be sold at a profit to be split with Hellerman. (Tr. 28, 59). Greco and Goral each gave Hellerman names of relatives and friends for transfer of the stock. (Tr. 34, 61).

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* Rafalowicz and his partner had agreed to purchase 2,000 shares of MACP stock from Mayer. Mayer told Rafalowicz that this $1,600 represented an $.80 per share commission which they would not have to pay.

The week before July 17, 1972, Hellerman arranged for Joseph Lichtman to obtain six checks totalling $125,000: two checks from Greco, one for $11,000 and the other for $30,000 (GX 156, 157); a check from Goral for $45,000 (GX 159); a check from Weinreb for $15,000 (GX 186); a check payable to "George K. Lent" for $23,245.50 given to Lichtman by Hellerman (GX 147); and an official bank check for $754.50 obtained with cash given to Lichtman by Hellerman (Tr. 226; GX 183). Joseph Lichtman delivered these checks to Mayer, along with the names provided by Greco and Goral. (Tr. 227-28).

Mayer gave the names to another person in the Kluger 47th Street office to prepare sales confirmations while Joseph Lichtman waited in the office. (Tr. 228). After Mayer told Lichtman that he needed additional names, Lichtman telephoned Hellerman—in Mayer's presence—and wrote down names of individuals that Hellerman dictated over the telephone. (Tr. 229; GX 178). Lichtman gave this list to Mayer. A few minutes later, Mayer handed Lichtman a typewritten letter to be signed by "George K. Lent" stating that he had given A. C. Kluger & Co. $24,000 for purchase of MACP stock in the names Hellerman had given to Lichtman over the telephone a few minutes earlier. Mayer instructed Lichtman to sign the letter "George K. Lent". Lichtman complied and returned the letter to Mayer. (Tr. 230-34; GX 145).

On Friday, July 14, 1972, Mayer delivered the checks totalling $125,000 which he had received from Lichtman, together with the Greco, Goral and "George K. Lent" names, to Sheila Murray who handled preparation of papers for underwritings at the Kluger office on 42nd Street. (Tr. 297-307). Murray used those names to prepare a letter for delivery to the SEC specifying the name

of each purchaser of MACP stock and the number of shares purchased. (Tr. 307-08; GX 213). Mayer told her that the closing of the stock offering would be held the following Monday, July 17. (Tr. 303).

On July 17, 1972, Mayer attended the MACP closing at the offices of Glass & Greenberg, the law firm retained by A. C. Kluger & Co. for the MACP underwriting. (Tr. 460, 465). During the closing, Leonard R. Glass, the partner of the firm in charge of the underwriting, reviewed the list of purchasers prepared by Sheila Murray. Noticing that there were several persons on the list who had purchased large amounts of MACP stock, Glass asked Mayer if he had talked with every one of the purchasers and had been satisfied that the stock was a suitable investment for each of them. Mayer replied that he had spoken to every person on the list and considered the stock to be a proper investment for each person. (Tr. 467-68). Glass then permitted the closing to proceed. (Tr. 469).*

The Government presented testimony of 12 persons whose names had been given by Mayer to Sheila Murray to be included in the letter to the SEC. Each testified that he or she did not know Mayer and had never talked to him or communicated with him in any manner.**

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* Joseph Lichtman received $215,000 at the closing as the proceeds of the offering, which he deposited in an MACP bank account. (Tr. 249; GX 210-11).

** The nominees who testified were Joseph Farace (Tr. 350-60); Henry Bressack (Tr. 360-66); Carol Bartsch Goral (Tr. 366-69); Jeanne Weinreb (Tr. 370-71); Philip J. Batiato (Tr. 371-75); Darlene Agriss (Tr. 375-80); Alan Jasper (Tr. 380-83); Ira Lerman (Tr. 384-92); Ann M. Prestia (Tr. 443-47); Eugene Serino (Tr. 448-50); Fred De John (Tr. 450-53); and Philip Kaftol (Tr. 454-59).

Joseph Lichtman used the proceeds of the underwriting to cover checks in the following amounts drawn on an MACP account: $45,000 to Greco * and $45,000 to Goral (Tr. 40, 64, 237-39; GX 231-34); $15,000 to Weinreb (Tr. 71-72, 226-27; GX 181); and $20,000, $20,000 and $15,000 which Hellerman delivered to Irwin Schlacter to be "laundered" through a special account maintained by Schlacter. (Tr. 437-40; GX 235, 237-38).

B. The Defense Case

The defense case consisted of testimony by defendant, Leon Mayer; his brother, Isaac Mayer; and two character witnesses.

Leon Mayer denied receiving the $20,000 cash which had been left in escrow, contradicting the testimony of Leon Rafalowicz and Murray Lichtman. (Tr. 706). He further denied any knowledge of the escrow receipt which Rafalowicz had signed. (Tr. 706).** As for the "George K. Lent" letter, Mayer claimed that Joseph Lichtman had brought the letter to his office already signed. (Tr. 720). On cross-examination Mayer stated that he was certain the letter had not been typed at the Kluger office, contrary to the testimony of Joseph Lichtman. (Tr. 734-35).

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* Greco had only given to Hellerman checks totalling $41,000 for delivery to Lichtman. The additional $4,000 in the check to Greco represented repayment of an earlier $4,000 loan from Greco to Hellerman. (Tr. 27).

** Mayer acknowledged that he had met Rafalowicz on several occasions. (Tr. 704-05). Nevertheless, in commenting on Rafalowicz's testimony in his Brief, Mayer observes that Rafalowicz "was unable, prior to a recess in his testimony, to identify defendant Mayer in the courtroom." (Br. 26). Rafalowicz explained that he had not recognized Mayer at first in the courtroom because Mayer had grown a mustache since their last meeting. (Tr. 141). Mayer's former employer, Alan C. Kluger, found it difficult to identify Mayer for the same reason. (Tr. 331).

Isaac Mayer was the co-manager of the Kluger 47th Street office where he shared a small private office with his brother, Leon. (Tr. 544, 608). Isaac Mayer also testified, as did his brother, that Joseph Lichtman brought the "George K. Lent" letter to their office, already signed, and that the letter had not been typed at the Kluger office. (Tr. 574-75, 625-31).

C. The Government's Rebuttal Case

In rebuttal, the Government called Frankie E. Franck, a document analyst employed by the United States Postal Service Crime Laboratory in Washington, D.C. (Tr. 765). Franck testified that in his opinion the "George K. Lent" letter was "very probably written on the same typewriter" as the carbons of MACP stock purchase confirmations which had been typed at the Kluger 47th Street office. (Tr. 778).*

D. Pretrial Motions To Dismiss The Indictment

On June 30, 1975, Mayer filed a notice of motion and supporting affidavit seeking a bill of particulars, document discovery, and exculpatory material. (D. App. 23-33). The notice specified that the motion would be made "at a future date time and place to be fixed by the Court". (D. App. 23). By letter to the District Court dated August 29, 1975, Mayer's counsel stated that the issues raised by his motion relating to document discovery and exculpatory material had been resolved, and he withdrew all but the motion for a bill of particulars which

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* Franck stated that his opinion had to be qualified because the confirmations used for his comparison were carbons and not original impressions. (Tr. 778).

he asked the District Court to calendar for September 19, 1975. (D. App. 76).

The Government thereafter served its bill of particulars on Mayer's counsel on October 10, 1975. (D. App. 129-32). At the same time, it served a notice of readiness for trial (D. App. 34).

On May 26, 1976, Mayer filed a notice of motion to dismiss the indictment and supporting affidavit. (D. App. 44-85). One of the grounds for this motion was a claim that the Government was not "in fact" ready for trial on October 10, 1975, because it had failed to respond to his motion for a bill of particulars and because it had failed to give Mayer "complete documentary discovery". (D. App. 47, 49-50). The District Court denied Mayer's motion in a memorandum and order dated August 5, 1976. (D. App. 86-108).

On September 9, 1976, Mayer filed a notice of motion for reargument and supporting affidavit, again claiming that the Government was not ready for trial on October 10, 1975. (D. App. 114-37). The District Court denied Mayer's motion for reargument in a memorandum and order dated October 19, 1976. (D. App. 138-43).

By order to show cause dated November 3, 1976 (D. App. 144-209), Mayer, for a third time, moved to dismiss the indictment on the ground that the Government was not ready for trial on October 10, 1975, because the Government failed "to make substantial discovery materials available to defendant prior to the expiration of the aforesaid six-month period". (D. App. 146). The District Court denied this motion, with prejudice, by an endorsement order dated November 11, 1976. (D. App. 225).

1. Bill of Particulars

Mayer's motion filed June 30, 1975, sought a bill of particulars as requested in a letter dated May 5, 1975, to

Assistant United States Attorney W. Cullen MacDonald. (D. App. 29-33).* The case was reassigned from MacDonald to Assistant United States Attorney Eugene F. Bannigan in the fall of 1975, and Bannigan prepared the Government's bill of particulars filed on October 10, 1975. (D. App. 129-32). The bill of particulars was not responsive to items (2), (5) and (11) specified in the schedule enclosed with the May 5, 1975, letter to MacDonald.**

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* The indictment itself had supplied many particulars and described with particularity Mayer's actions about which evidence was later introduced at trial. As the "means" by which the conspiracy was carried out, the indictment alleged that the Lichtmans "delivered $20,000 cash as 'front money' to a stakeholder to be secretly disbursed" to Mayer (D. App. 10), and that Mayer and the other defendants "falsified purchases of approximately 30,000 shares of MACP by advancing $150,000 under a secret agreement that MACP would repay such amounts." (D. App. 11). The overt acts set forth in count one stated that Murray Lichtman at a meeting with Mayer and Stein "agreed to pay them secret underwriting commissions"; that "$20,000 in United States currency was delivered to one Leon Rafalowicz to be secretly paid" to Mayer and Stein; and that Mayer transmitted $215,000 at the closing of the sale of 50,000 MACP shares "while concealing the fraudulent character of such sales from those present." (D. App. 11).

** Item (2) in the schedule demanded that the Government specify "[a]ny overt acts not enumerated in the indictment, concerning which acts the Government intends to offer evidence upon the trial of the indictment herein." (D. App. 31). Item (11) sought "names and addresses of any witnesses who testified before the grand jury whom the Government does not intend to call as witnesses upon the trial of this indictment." (D. App. 32). Item (5) referred to the second overt act alleged in count one of the indictment and sought the "name of the person who allegedly gave $20,000 to defendant Mayer as alleged in the indictment, and the date, time, and place of this alleged payment". (D. App. 31). The second overt act, however, alleged delivery of $20,000 to Leon Rafalowicz on or about January 28, 1972, and did not allege payment of money to Mayer. (D. App. 11).

After the Government filed its bill of particulars, Assistant United States Attorney Bannigan resigned from the United States Attorney's Office to enter private practice, and the case was reassigned to Assistant United States Attorney John W. Timbers. Mayer's counsel then met with Timbers to discuss Mayer's position that the Government should respond further to certain of the items requested in the motion for a bill of particulars. By letter to Timbers dated March 17, 1976, Mayer's counsel specified eight items under the heading "Outstanding Matters Not Disclosed By Government's Bill of Particulars". (App. 6a-7a). Item 1 was "Addresses of co-conspirators not named in indictment" (App. 6a), which had been a part of item (1) in Mayer's original schedule. (D. App. 31). Mayer's counsel continued to press for a response to items (2), (5) and (11) of his original schedule, repeated as items 2, 5 and 8 in the March 17 letter, and took the position that the Government had not adequately responded to items (3), (4), (7) and (10) in his original schedule, repeated as items 3, 4, 6 and 7 in the letter (App. 6a-7a; D. App. 31-32). The letter acknowledged that items (1), (6), (8) (9) and (12) of Mayer's original schedule were no longer "outstanding" after the filing of the Government's bill of particulars on October 10, 1975, except for addresses of co-conspirators.

In connection with a conference scheduled for May 14, 1976, the District Court directed the Government to submit affidavits about its readiness for trial within six months of the date of the filing of the indictment.* One of the papers submitted by the Government was an affidavit of former Assistant United States Attorney Bannigan. Bannigan stated that the bill of particulars filed on October 10, 1975, was prepared by him in response to specific demands from defendants Joseph

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* See footnote, page 25, *infra*.

Lichtman and Greco, and that he did not have Mayer's demand before him when he prepared the bill due to an "inadvertent oversight". (D. App. 41).

Mayer's counsel then moved to dismiss the indictment on the alleged ground that the prosecutor was not ready for trial within six months from the filing of the indictment since "the prosecutor has failed for over eight months to respond to Mayer's motion for a bill of particulars". (D. App. 49). In his affidavit in support of this motion, Mayer's counsel stated: "At no time either prior to or subsequent to September 19, 1975, and right up to the present day, i.e., May 25, 1976, have I ever received . . . a bill of particulars." (D. App. 52).*

The District Court found that the Government had served a bill of particulars on Mayer and denied his motion to dismiss. With respect to Mayer's specific demands Judge Tenney ruled as follows:

> "As to defendant Mayer, the Government has sufficiently answered demands 1, 3, 4, 6, 7, 8, 9, 10, and 12. Demands 2, 5, and 11, to which the Government objects are not properly interposed and the Government need not respond." (D. App. 104).

On motion for reargument, Mayer's counsel stated that he had received the "bill of particulars" which had

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* The District Court found this contention difficult to understand:

> "Curiously, the sworn affidavit of service appended to the bill of particulars as well as the sworn affidavit of service appended to the Government's memorandum indicate that proper service by mail was made upon counsel for defendant Mayer. The Court, crediting both assertions, can draw only one conclusion in the face of this unusual state of facts, namely, that these documents, properly posted, were lost in the mails or somehow never received by defendant." (D. App. 93-94).

been served by the Government but claimed that the Bannigan affidavit established that this was not the bill of particulars sought by Mayer's motion. (D. App. 117-18). He then stated:

> "I, as Mayer's counsel, never even conceived of the *possibility* that this piece of paper was the prosecutor's response to Mayer's motion for a bill of particulars." (D. App. 119) (emphasis in original) (footnote omitted).

In response to a request from the District Court, the Government specified again for Mayer's counsel the paragraphs of its bill of particulars which in fact responded to the items sought in Mayer's demand. (App. 1a-3a). In a letter to the District Court dated September 20, 1976, Mayer's counsel disputed the Government's analysis, stating that the bill of particulars which was served contained "only one item of particulars in answer to one of the twelve items of Mayer's demand". (App. 4a).

The Government had not included the March 17, 1976, letter from Mayer's counsel, discussed at page 13, *supra*, in its response to Mayer's original motion to dismiss. After the claim that the October bill of particulars contained "only one item" which responded to Mayer's demands, however, the Government pointed out to the District Court that this position was inconsistent with the position Mayer's counsel had taken in the March letter concerning "Outstanding Matters". (App. 5a). The District Court agreed and denied Mayer's motion for reargument:

> "Furthermore, the prosecutor presently handling this case has advised the Court of a letter from Mayer's counsel dated March 17, 1976 concerning 'Outstanding Matters Not Disclosed by the Government's Bill of Particulars.' A comparison of the items enumerated in that letter with the

twelve items listed in the original request of May 5, 1975 indicates that defense counsel considered only seven of the twelve items not disclosed. The Government appears to have answered four of these seven 'outstanding' requests (3, 4, 7 and 10). The other three requests (2, 5 and 11) were found by this Court to have been improperly interposed." (D. App. 139-40).

2. Discovery

After the indictment was filed, Mayer's counsel conferred with Assistant United States Attorney MacDonald about discovery. In his May 5, 1975, letter to Mr. MacDonald, Mayer's counsel wrote:

> "Confirming our previous telephone conversation and the one we had this morning, you have indicated that the prosecution will supply to me, as defense counsel for Mr. Mayer, all the material to which Mr. Mayer is entitled without the necessity of formal motions." (D. App. 29).

The "Schedule of Items" enclosed with the letter included four items under the heading "Request for Discovery and Inspection". (D. App. 31-32).* Mayer's counsel sent a copy of his letter to MacDonald, with the enclosure, to the District Court with a letter dated May 13, 1975. In that letter he described the enclosure which he had sent to MacDonald as a "schedule of requested items". (D. App. 66).

MacDonald transmitted discovery materials to Mayer's counsel, pursuant to Rule 16 of the Federal Rules of

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* This schedule also included the 12 items requested as a bill of particulars.

Criminal Procedure, with a letter dated May 30, 1975, and stated that other materials were available for inspection in his office. (D. App. 79). In a letter to the District Court dated August 29, 1975, Mayer's counsel stated that "Mr. MacDonald and I have conferred extensively and have resolved the issues in that portion of the motion relating to discovery, subject to a few outstanding items which Mr. MacDonald has stated that he will provide to me." (D. App. 76).

In March, 1976, Mayer's counsel conferred with Assistant United States Attorney Timbers who was then assigned to the case. Following that meeting, Mayer's counsel sent the letter to Timbers dated March 17, 1976, which also included a list of 10 items under the heading, "Outstanding Items from Defendant Request for Discovery and Inspection". (App. 6a-8a).

In Mayer's first motion to dismiss the indictment, he also claimed that the Government had not been ready for trial within six months from the filing of the indictment because

> "the prosecutor has failed to give defendant Mayer the complete documentary discovery to which he was entitled under Rule 16 of the Federal Rules of Criminal Procedure and which he promised to give in early May, 1975, over one year ago." (D. App. 50).

In denying this motion, the District Court found that, with two minor exceptions, the Government had given Mayer the materials he had requested. (D. App. 96). As for additional materials, the District Court stated: "Since the Rule requiries a defendant to make a request of the Government before a duty devolves upon the Government, and since there was no such request, the Court concludes that there can be no duty." (D. App. 96).

In a letter dated October 19, 1976, to Mayer's counsel, Assistant United States Attorney V. Thomas Fryman, Jr., who was to be the Government's attorney at the trial commencing on November 15, 1976, stated:

> "We have decided to make available for your inspection all documents obtained from third parties by the Securities and Exchange Commission and the Department of Justice in the investigations of Minute Approved Credit Plan, Inc., and Computer Microdata Corp., as well as the SEC registration files relating to Minute Approved Credit Plan, Inc. We are making all of this material available now in order to avoid delays at trial from any possible claims that certain items should have been produced in advance of trial but were not." (D. App. 165-66).

The letter continued that certain documents had been segregated into a tentative trial exhibit folder, and a list of those tentative trial exhibits was enclosed. (D. App. 166, 171-209).

Mayer's counsel did not come to the United States Attorney's Office to review any documents until October 29, 1976. Review of all of the documents was then completed by November 1, 1976, in a total time of approximately 16 hours. Mayer's counsel requested copies of approximately 2,300 pages of documents, which were delivered to him on November 4 and November 5. Many of the documents included in those 2,300 pages were SEC registration files which were public records. (App. 11a-12a).

The availability of this material prompted Mayer's final motion to dismiss the indictment, brought on by order to show cause dated November 3, 1976. The Dis-

trict Court in its endorsement order denying Mayer's motion stated:

> "Defendant Mayer's motion to dismiss the indictment against him on the ground that the Government was not ready for trial at the time its notice of readiness was filed is den . The contention that the Government failed to make certain discovery materials available on time is without merit. This Court has already held that it was the defendant's obligation to specifically request those documents he wished to discover." (D. App. 225).

The District Court continued:

> "Mayer's counsel specifically requested items, which were then made available by the Government for discovery purposes. The Government was under no obligation to physically deliver to the defendants all the documents in its possession including, *inter alia*, public SEC files and records. The Government adequately complied with its requirements under Rule 16 of the Federal Rules of Criminal Procedure." (D. App. 225).

ARGUMENT

The Government Was Ready For Trial As Required By Rule 5 Of The Plan For Achieving Prompt Disposition Of Criminal Cases Of The Southern District Of New York.

Mayer argues that the Government did not comply with the Southern District Plan for Achieving Prompt Disposition of Criminal Cases (effective September 29, 1975) in three respects: (1) the Government was not "actually" ready to try the case within six months of the

filing of the indictment (Br. 43-45); (2) it had failed to respond to Mayer's motion for a bill of particulars within that period (Br. 38-42); and (3) it had failed to comply with its discovery obligations within that period (Br. 34-38). Upon these claims Mayer contends he was entitled to dismissal of the indictment. His arguments are based on both a misinterpretation of the Southern District Plan and a misstatement of the proceedings prior to trial in the District Court.

Mayer's contention that the Government was not "actually" ready for trial on the date it filed a timely notice of readiness is frivolous. The argument is based on the reassignment of this case from Assistant United States Attorney MacDonald to Assistant United States Attorney Bannigan prior to the filing of the notice of readiness on October 10, 1975. Mayer refers to the Bannigan affidavit submitted in May, 1976, to characterize his "extremely limited exposure to the case" when the notice of readiness was filed and to contrast the "extensive preparation of the case by Assistant MacDonald". (Br. 44). This attempted comparison of preparation is simply not relevant under Rule 5 of the Southern District Plan then in effect, which required that the Government be ready for trial—not any particular Assistant United States Attorney. MacDonald remained in the United States Attorney's Office; Mayer concedes that he was fully famliiar with this matter; if necessary, he could have tried the case.

Moreover, this argument by Mayer—made for the first time in this Court and without reference to any pertinent supporting authority*—if credited, would give rise

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* Mayer's reliance on *United States* v. *Altro*, 358 F. Supp. 1034, 1040 (E.D.N.Y. 1973), is misplaced. The quotation from *Altro* at page 43 of Mayer's Brief concerns a failure by the Government to file a notice of readiness within six months

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to an impractical and burdensome judicial inquiry behind the Government's notice of readiness that was surely not intended by enactment of the Southern District Plan. Indeed, to conduct an inquiry of the type proposed by Mayer, the District Court would have to evaluate such thorny factual issues as the relative difficulties of the case,* the nature and volume of the Government's evidence, the experience of the particular prosecutor assigned to the trial, and his specific familiarity with the material in hand. Such a time consuming inquiry is simply not required. The trial court can test the good faith basis for the Government's announcement of readiness by merely calling

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and whether, in that situation, the Government might avoid dismissal of the indictment by establishing that it was nevertheless ready to try the case within the six months period. There is no suggestion in the opinion that an inquiry be undertaken by the District Court with respect to the Government's "actual" readiness when a notice has been timely filed.

* This would mean more than merely counting witnesses and documents. Mayer points out that 34 witnesses testified in the SEC investigation and nine witnesses testified before the grand jury. (Br. 44). But it must have been clear by October 1975 that the straightforward story of Mayer's involvement could be told through the testimony of five witnesses with direct knowledge of it: Leon Rafalowicz, Sidney Stein, Leonard R. Glass, and Joseph and Murray Lichtman—the last two of whom had made complete confessions to the SEC and could have reasonably been expected eventually to withdraw their pleas of not guilty. (See Tr. 186-88, 194-98, 282-84). Mayer also states that the investigations related to the case collected documents that filled six file cabinet drawers. (Br. 44). But the exhibits at the Mayer trial were only a small fraction of this total and consisted of SEC filings, routine bank and brokerage house records, and a few directly incriminating documents, such as the Rafalowicz receipt and the "George K. Lent" letter. Indeed, even Mayer's counsel was able in sixteen hours to eliminate as irrelevant all but 2,300 pages of those documents in the six file cabinet drawers, with many of the 2,300 pages being repetitive SEC filings.

the case for trial. *Cf. United States* v. *Pacelli*, 470 F.2d 67, 69 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973).

Mayer next argues that the Government's notice of readiness was not effective because the Government failed to respond to his motion for a bill of particulars within the six months period. This argument is two-pronged: first, Mayer does not concede that the bill of particulars filed on October 10, 1975, was adequate (Br. 40); second, he claims that the Government's delay in objecting to certain of his demands—objections that the District Court later sustained—alone should be sufficient for dismissal of the indictment under Rule 5.

The first part of Mayer's argument conflicts with the District Court's finding that the October, 1975, bill of particulars sufficiently answered his demands, and it is in substantial conflict with the prior position of Mayer's counsel, as stated in his March 17, 1976, letter to Assistant United States Attorney Timbers.* Mayer does not and cannot attack the soundness of Judge Tenney's ruling that certain of his demands were not properly interposed. Nor does Mayer offer any analysis to contradict the District Court's finding that other of his demands were sufficiently answered.

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* Mayer does not mention this letter in his Brief even though it was specifically discussed in the District Court's memorandum and order dated October 19, 1976. (D. App. 139-40). When the letter was first brought to the District Court's attention by the Government in response to Mayer's motion for reargument, his counsel stated that he "could easily respond" to the Government's reference to this letter "to show that nothing in the letter is inconsistent with Mayer's present posture on his motion for reargument." (App. 9a). Mayer's counsel, however, never made any such response either in the District Court or in this Court.

The theory underlying the second part of Mayer's argument with respect to the bill of particulars is that the Government "tied the hands" of the District Court and "prevented the bringing of this case to trial for the entire period of the government's default." (Br. 42). While admittedly the Government here should have been more alert and prompt with respect to Mayer's motion, the idea that the Government can "tie the hands" of the District Court is unrealistic. When a District Court considers the Government to be dilatory in any respect on a defendant's motion, it can simply grant the motion by default. Moreover, Mayer had remedies available to him if he thought the Government had failed to respond to his demand. Mayer neither pursued such remedies nor sought to press his motion during the period of the Government's alleged default. *See United States* v. *Pollak*, 364 F. Supp. 1047, 1050 (S.D.N.Y. 1973), *aff'd mem.*, 492 F.2d 1237 (2d Cir. 1974). Instead, he chose to sit back and await further developments, perhaps in contemplation of the multiple motions for dismissal which he subsequently made.

Finally, Mayer argues that the Government failed to comply with its discovery obligations within the six months period. Mayer does not claim that the Government failed to respond to any discovery motion, since he withdrew his discovery motion in the letter from his counsel to the District Court dated August 29, 1975. Rather, he argues that the Government failed to honor an agreement by Assistant United States Attorney MacDonald to provide "all documents to which Mayer was entitled under Rule 16(b)." (Br. 35). This argument again is contradicted by the factual finding of the District Court that Mayer's counsel specifically requested items which were made available by the Government for discovery purposes.

Mayer claims that the record "clearly and unambiguously demonstrates" that the trial court erred in finding that the Government only was to produce documents specifically requested by Mayer's counsel. (Br. 35). He emphasizes that the Government did not submit to the District Court an affidavit by MacDonald contradicting the assertions by Mayer's counsel concerning the discovery agreement. (Br. 35-36). In its memorandum in opposition to Mayer's last motion to dismiss the indictment, the Government offered to submit to the District Court, upon request, an affidavit of MacDonald "[i]f the Court should desire any further information about discussions between the Government and Mayer's attorney concerning discovery". (App. 15a). The District Court, however, did not request such an affidavit because Judge Tenney had ample reason to reject Mayer's claim on the basis of statements by his counsel in the record which contradicted it: for example, the earlier statement by Mayer's counsel to the District Court that the list included with his May 5, 1975, letter to MacDonald was a "schedule of requested items". Furthermore, Mayer's belated claim that he had not received the full discovery allegedly promised him was inconsistent with his long-standing failure to seek relief from the District Court at an earlier point in time.*

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* In an effort to make out a claim of prejudice that simply does not exist, Mayer asserts here that he and his counsel found themselves "inundated by a massive, documentary discovery" following the letter from the Government dated October 19, 1976, announcing that all third-party documents obtained in the investigations of MACP and another corporation, as well as SEC files relating to MACP, were available for inspection. (Br. 37). This contention ignores the facts that Mayer's counsel did not bother to come to the United States Attorney's Office to look at any of the documents until eight days after his receipt of the letter; that counsel was then able to review all of the documents in 16 hours, eliminating all but 2,300 pages as irrelevant; and that copies of those materials were promptly made

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In his discussion of Mayer's motions to dismiss, Judge Tenney assumed that the readiness requirement of Rule 5 included completion of discovery to a defendant and found that the Government had complied with this requirement.*

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available to him at least ten days prior to trial. Moreover, these documents contained many pages of repetitive filings with the SEC pertaining to the MACP stock offering and had always been publicly available. The materials copied also contained the documents included in the Government's tentative list of trial exhibits which had accompanied the October 19 letter to Mayer's counsel. While that enclosure listed 331 proposed exhibits, the descriptions of the proposed exhibits indicated that the total number far exaggerated the complexity of the case. For example, over half of the exhibits were routine forms involved in mailing or delivering the MACP stock to customers of A.C. Kluger & Co.: 65 were confirmations (D. App. 174-85); 30 were form letters to purchasers (D. App. 198-200); 15 were customers receipts for delivery of stock shares (D. App. 201-03); and 61 were certified mail receipts, return receipts or envelopes relating to delivery of the shares (D. App. 203-09). Finally, Mayer's complaint with respect to the handwritten notes of prior interviews with Joseph Lichtman (Br. 18-20, 27-28) ignores the facts that (a) Mayer received these notes three weeks earlier than he was entitled to them under 18 U.S.C. § 3500; and (b) the Government gave him a typewritten chronology summarizing the notes. (Tr. 246). In short, Mayer's claim that production of this group of documents caused "frustration, despair and disillusionment" and "made the trial a feverish nightmare for defendant and his counsel" (Br. 37-38) must be greatly overstated.

* In his memorandum and order dated August 5, 1976, Judge Tenney reviewed the correspondence which had accompanied the informal discovery prior to October 10, 1975, and explained the reason for his May 14, 1976, conference with counsel:

> "Unfortunately, none of these communications regarding Rule 16 materials were known to the Court since no copies of these letters were sent to the Court or docketed.
>
> This, then, was the posture of the case when the Court reviewed it prior to assigning a trial date. The continued pendency of defendant J. Lichtman's motion to dismiss for preindictment delay, some discrepancies with regard to the various bills of particulars, and the apparent lack of

[Footnote continued on following page]

Mayer contends here that it is "undisputed" and "unquestionable" that readiness under Rule 5 "includes performance of obligations and duties in respect to discovery and particulars to which defendants are entitled." (Br. 31, 34). In support of this position Mayer cites only *United States* v. *Blauner*, 337 F. Supp. 1383, 1388 (S.D. N.Y. 1971), an earlier decision by Judge Tenney where the Court noted that the notices of readiness were sent "before any attempt was made to comply with outstanding orders of two district judges, twice reordered by another" and that the failure to comply with the orders had continued "for in excess of two years". *Id.*

The position that Mayer describes as "undisputed" and "unquestionable", however, has been expressly left open by this Court. In *United States* v. *Strayhorn*, 471 F.2d 661 (2d Cir. 1972), the defendant claimed that the Government had not complied with a discovery order until late February, 1972. This Court noted that this time was within the six months period "*even if* the latter date is controlling". *Id.* at 667 (emphasis added). In *United States* v. *Pollak*, 474 F.2d 828 (2d Cir. 1973), the Government had filed a notice of readiness on November 18, 1971, but had not complied with the trial court's discovery order by that date. This Court left unanswered the question "whether [the Government's] notice of readiness was therefore meaningless." *Id.* at 830. In remanding for further findings, this Court stated:

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response to the various discovery requests caused the Court to question the genuineness of the Government's Notice of Readiness. Consequently, the Court, *sua sponte*, ordered a hearing to inquire into the matter and to prepare a record for any eventual appellate review. . . . For the reasons set forth below, the Court is satisfied that the Government had, in fact, complied with the spirit of Rule 5 and was ready for trial when the notice was filed." (D. App. 90-91).

> "In this regard, it may be remarked that there were remedies open to appellant to obtain compliance with the discovery order. Fed.R.Crim.P. 16 (g). We also note the claim that at all times the Government stood ready to permit inspection of the requested documents although it was concededly and probably properly unwilling to give over originals. Whether the Government conveyed this readiness to permit inspection and whether appellant sought to make such an inspection may have some bearing on resolution of the main question." *Id.* at 830-31.

On remand in *Pollak*, the District Court first stated: "As the Court of Appeals noted, other remedies to compel compliance by the Government were available to the defendant." *United States* v. *Pollak*, 364 F. Supp. 1047, 1050 (S.D.N.Y. 1973), *aff'd mem.*, 492 F.2d 1237 (2d Cir. 1974). The District Court then concluded:

> "Defendant has shown no valid reason to construe Rule 4 [the predecessor of Rule 5] so as to provide an additional remedy to facilitate discovery. In light of these considerations, this court cannot say that Rule 4 requires a holding that the Government was unready merely because it did not supply the bill of particulars before the expiration of the six-month period of Rule 4." *Id.*

On appeal, the District Court's order was affirmed without opinion. *United States* v. *Pollak*, 492 F.2d 1237 (2d Cir. 1974). Recently in *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 791 (2d Cir. 1976), this Court found it unnecessary to consider the position urged by Mayer, given the defendant's failure to have moved for either a bill of particulars or inspection of certain tapes.

The Government submits that readiness for trial under Rule 5 does not, and should not, mean that the Gov-

ernment must have completed discovery under Rule 7(f) and Rule 16 of the Federal Rules of Criminal Procedure. In the first place, as suggested in this Court's opinion in *Pollak*, the trial courts already have an adequate arsenal of sanctions to assure proper discovery by the Government, including the specific provisions in Rule 16(d)(2), and do not need the additional sanction of dismissal under Rule 5. Second, Mayer's interpretation of Rule 5 places an awkward construction on the language of the Rule which is focused only on the readiness of the Government for trial. Certainly the Government could be ready for trial even before a defendant filed any discovery motion, and it could file a notice indicating such readiness. *Cf. United States* v. *Bowman*, 493 F.2d 594 (2d Cir. 1974). Under Mayer's proposal, however, such conceded readiness apparently would cease once a discovery motion was filed until after the Government had complied. Furthermore, Mayer's proposal would freeze discovery into a rigid time frame for all cases. Rule 16(a)(1)(C), as amended effective December 1, 1975, provides that the Government must make available all documents intended for use by the Government as evidence in chief at the trial. Under the provisions governing the scheduling of criminal cases in effect prior to July 1, 1976, it was possible for a substantial period of time to elapse between the end of the six months specified in Rule 5 and actual commencement of the trial. An inflexible rule allowing all defendants to have access to all such exhibits during such an indefinite period of time would not have been sound policy: the potential in some situations for obstruction of justice, such as threats to witnesses identified through the exhibits, is apparent.

In sum, Mayer's argument is unsound both as a matter of fact and as a matter of law.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

V. THOMAS FRYMAN, JR.,
ROBERT J. JOSSEN,
Assistant United States Attorneys, Of Counsel.

APPENDIX

Letter dated September 15, 1976, from V. Thomas Fryman, Jr., to Melvin D. Kraft

* * * * *

At the pretrial conference before Judge Tenney on September 13, the question was raised whether the Government's Bill of Particulars served on October 10, 1975, had responded to your prior demands.

This matter was analyzed at pages 8-9 and Appendix A of the Government's Third Omnibus Memorandum In Opposition to Defense Motions previously served upon you. An additional copy of those pages is enclosed for your convenience.

* * * * *

Enclosure

* * * * *

The next part of this section of the Government's memorandum will discuss each of the pre-trial matters that defendants claim were not completed when the Government filed its Notice of Readiness.

With regard to defendant Mayer's demand for a bill of particulars, although the May 14, 1976 Bannigan affidavit concedes that this demand was not answered before the Government filed its Notice of Readiness, subsequent analysis has shown this concession to have been overly generous and in error, since Mayer's demand had, in fact, been fully answered. In Appendix A to this memorandum we have charted the Government's responses to the twelve items in Mayer's demand. Appendix A shows that, prior to filing its Notice, the Government voluntarily served Mayer's counsel with answers to eight of Mayer's twelve demands. One of the four remaining unanswered demands requests documents that the Government will produce as part of its docu-

mentary production; while the three remaining demands, which are beyond the proper scope of a Bill of Particulars,* were opposed in the Government's omnibus memorandum which was also served on Mayer's counsel. Thus, although the Government's omnibus memorandum in opposition to the defendants' demands does not explicitly refer to Mayer's demand, its Bill of Particulars and omnibus memorandum, which were served on Mayer's counsel, fully replied to Mayer's demands.

It should be noted in passing that Mr. Bannigan's failure to discover Mayer's demand, when reviewing the case file, is understandable since Mayer never served a document entitled "Demand for a Bill of Particulars" on the Government, nor did he file such a formal demand with the Court. Mayer's "demand" is no more than an attachment to a May 5, 1975 letter from Melvin Kraft, Esq., to Assistant United States Attorney W. Cullen MacDonald.** The letter, in turn, is an exhibit to an affidavit that accompanies Mayer's June 27, 1975 Notice of Motion.

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* The three Mayer demands which the Government opposes because it deems them improper requests are: (1) "overt acts" not enumerated in the indictment, on which the Government intends to offer proof at trial (demand 2); (2) particularization of matters not alleged in the indictment (demand 5); and (3) the names of witnesses called before the grand jury but whom the Government does not intend to call at trial (demand 11).

** Mr. MacDonald was the Assistant United States Attorney in charge of this case before it was assigned to Mr. Bannigan.

Enclosure

CHART OF RESPONSES TO LEON MAYER'S REQUEST FOR PARTICULARS

Number of Mayer Demand	*Where Mayer Demand is Answered*
1.	Bill of Particulars, paragraph 1
2.	Not answered
3.	Bill of Particulars, paragraphs 3(g) and (h)
4.	Government Bill of Particulars, paragraph 2 (First Overt Act)
5.	Not Answered. (This demand seeks particulars about something not alleged in the indictment. The overt act in question alleges that on January 28, 1972 $20,000 was delivered to Leon Rafalowicz with the understanding that the money would secretly be paid to Mayer and Stein. There is no allegation that the money was, in fact, paid to Mayer. Nonetheless, the demand asks who paid the $20,000 to Mayer.)
6.	Bill of Particulars, paragraph 3 (a-k)
7.	Indictment, paragraphs 3 (b-d), Bill of Particulars, paragraph 3
8.	Bill of Particulars, paragraph 3
9.	Bill of Particulars, paragraph 3
10.	Indictment, paragraph 3 of Counts Two through Eleven
11.	Not answered
12.	Will be made available as part of Rule 16(b) document production

Letter dated September 20, 1976, from Melvin D. Kraft to V. Thomas Fryman, Jr.

* * * * *

In reply to your letter of September 15, 1976, I believe I have indicated in Mayer's motion for reargument that the analysis in the government's Third Omnibus Memorandum (pp. 8 and 9) is erroneous.

Furthermore, I take objection to the tactics of a successor prosecutor indicating in an unsworn memorandum that his predecessor's affidavit on this point was in error, as the above-mentioned memorandum argues. In addition, the statement on page 8 of the memorandum that:

> Mayer's demand had, in fact, been *fully* answered. . . .

is shown to be also in error by the very next sentence in the memorandum which states at the end that the paper which was served contained only:

> answers to eight of Mayer's twelve demands.

In fact, the bill of particulars which was served, as pointed out in the motion for reargument, is substantially not responsive to Mayer's demand for particulars, containing only one item of particulars in answer to one of the twelve items of Mayer's demand; however, it does not appear appropriate to repeat at length what is already in my motion papers on this subject.

* * * * *

Letter dated September 23, 1976, from V. Thomas Fryman, Jr., to Melvin D. Kraft

* * * * *

We have received your letter of September 20, 1976, concerning the Government's bill of particulars.

Frankly, we are surprised at your position there that the bill contains "only one item of particulars in answer to one of the twelve item of Mayer's demand." We had previously received a letter from your office dated March 17, 1976, concerning "Outstanding Matters Not Disclosed by Government's Bill of Particulars," a copy of which is enclosed. A comparison of the "outstanding matters" listed in that letter and the twelve items listed in the original schedule enclosed with your May 5, 1975, letter to W. Cullen MacDonald shows that your office in March 1976 considered only seven of those items not disclosed—numbers (2), (3), (4), (5), (7), (10) and (11)—as well as addresses of co-conspirators. Appendix A to the Government's Third Omnibus Memorandum points out that four of those seven "outstanding" items—numbers (3), (4), (7) and (10)—had been answered, and Judge Tenney in his August 5, 1976 memorandum and order, held that the remaining three—numbers (2), (5) and (11)—were not properly interposed.

The papers in support of your motion for reargument do not include any memorandum setting forth the controlling decisions which you believe Judge Tenney overlooked in his ruling with respect to your items (2), (5) and (11). As I pointed out at the pretrial conference on September 13, such a memorandum is required for a motion for reargument by Rule 9(m) of the General Rules of the Southern District.

* * * * *

Enclosed Letter dated March 17, 1976

* * * * *

Confirming the substance of our prior telephone conversations, as well as our meeting in your office on March 8, 1976, we have requested disclosure of the following items by the Government:

I. *Outstanding Matters Not Disclosed by Government's Bill of Particulars*

1. Addresses of co-conspirators not named in indictment.
2. Any overt acts not enumerated in the indictment concerning which acts the Government intends to offer evidence at trial.
3. The manner in which Mayer is alleged to have falsified purchases of MACP stock and the dates on which such alleged falsification occurred.
4. Address of alleged meeting place where Mayer, Murray Lichtman and Sidney Stein (December 14, 1971) are alleged to have met. (Indictment, Count 1, Paragraph IV (1)).
5. The name of person who allegedly gave $20,000.00 to Mayer and the date, time, and place of this alleged payment (Indictment, Count I, Paragraph 4 (2)).
6. The matters constituting the "fraudulent character of sales," which Mayer is alleged to have failed to disclose (Indictment, Count I, Paragraph 4 (4)).
7. The nature of the participation of Mayer in the mail and telephone communications alleged in Counts III through XI, inclusive, of the Indictment.

Enclosed Letter dated March 17, 1976

8. Names and addresses of witnesses who testified before Grand Jury whom the Government does not intend to call as witnesses upon trial.

II. *Outstanding Items from Defendant Request for Discovery and Inspection*

1. Regulation A, Form 1-A, dated July 19, 1972.
2. Any and all exculpatory material relating to defendant Mayer.
3. The proposed witness roster of the Government.
4. Statements intended to be used in the Government's case in chief.
5. Documentary materials intended to be offered in evidence.
6. Advice regarding any pleas of other defendants.
7. Grand Jury testimony or other statement of Murray Lichtman (if not covered above).
8. The alleged fifth post-effective amended notification under Regulation A, Form 1-A (Indictment, Count XVIII).
9. Grand Jury exhibits numbers 4 and 5 re: *United States* v. *MACP*, testimony of Leon Mayer.
10. With reference to the meeting between AUSA MacDonald and Leon Mayer on or about March 3, 1975 and the former's notes thereof, disclosure of the following: the original MACP prospectus; all drafts, checks or notes given to Mr. MacDonald by defendant Mayer; any other documents referred to at said meeting.

Enclosed Letter dated March 17, 1976

With reference to any other meetings between Messrs. MacDonald and Mayer, including a second meeting held prior to Mr. Mayer's Grand Jury testimony on March 19, 1975, all transcripts, notes or statements prepared by Mr. MacDonald or any other person.

As we discussed this date, your expeditious reply is requested. Please advise me if you have any questions hereon.

* * * * *

Letter dated September 28, 1976, from Melvin D. Kraft to Hon. Charles H. Tenney

* * * * *

I wish to enter my strong objection to the continuing efforts of the prosecutor, as evidenced by his letter to me of September 23, 1976 (with copy shown to Your Honor), to litigate defendant Mayer's motion for reargument by letters to me with copies to Your Honor. The tactic of writing letters to an adversary with copies to the Court is, in any judgement, a wholly improper and disrespectful evasion of the regular motion practice rules and requirements.

It ill-behooves the prosecutor to complain that no memorandum of law was filed in support of Mayer's motion for reargument when (a) he, himself, failed to file any opposition papers as required by the Rules; and (b) the primary ground of the motion was to request reconsideration of the *facts* in the record.

Insofar as a bill of particulars is concerned, I could easily respond to the prosecutor's unfair production of an isolated letter from his files by pointing to both prior and subsequent letters and dealings, as well as the precise content of the letter, itself, to show that nothing in the letter is inconsistent with Mayer's present posture on his motion for reargument. Were I to do so, however, I would only dilute the force of my own objection to the Court's consideration of this kind of letter and also encourage the prosecutor to persist in these tactics. Hence, I make no response to the content of the letter and respectfully request that the Court exclude the prosecutor's letters to me of September 23, 1976 and September 15, 1976 from its consideration of the merits of Mayer's motion for reargument.

* * * * *

Affidavit of V. Thomas Fryman, Jr., Sworn to on November 8, 1976

* * * * *

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York. This case was assigned to me in August 1976, and I am familiar with the proceedings herein prior to that time from a study of the file and discussions with other Assistant United States Attorneys and representatives of the Securities and Exchange Commission who have worked on the case. I submit this affidavit in opposition to the motion to dismiss the indictment by defendant Leon Mayer brought on by order to show cause dated November 3, 1976.

2. During my initial study of the legal file, I came to the conclusion that an unusually large amount of time had been devoted to litigation of questions relating to discovery in this case. I understood from the memorandum and order dated August 5, 1976, that the Court had held after a thorough airing of the discovery claims by defendant Leon Mayer that the Government had satisfactorily complied with his demands except for a few items which have now been supplied. Nevertheless, I wanted to avoid the possibility of any renewed claims by defendants on the eve of trial or during trial relating to inadequate discovery which might prevent me from devoting my full attention to preparation and presentation of the Government's case. Responding to any such claim at that time might be particularly burdensome since this case has been previously assigned to three diffierent Assistant United States Attorneys, two of whom have resigned from the office to return to private law practice. I knew that much of the Government's proof would be documents and that Rule 16(a) of the Federal Rules of Criminal Procedure had been amended effective December 15, 1975, to allow pretrial discovery of Government ex-

hibits. While defendants' discovery motions as well as the filing of the Government's notice of readiness had both predated the effective date of the Rule 16 amendment, I was especially concerned that the broadened Rule 16 might spawn a lot of last minute motion activity about discovery.

3. After weighing these considerations, I decided to make available to defense counsel in advance of trial all documents obtained from third parties by the Securities and Exchange Commission and the Department of Justice in the investigation of Minute Approved Credit Plan, Inc., the corporation whose stock offering is the basis for the indictment in this case, and SEC registration files which we had obtained relating to that company. Certain of the individuals involved in this case were also involved in an investigation concerning Computer Microdata Corp., and I decided also to make available for inspection by defense counsel all third party documents collected in that investigation. I informed defense counsel that they could inspect any of those materials in a letter dated October 19, 1976.

4. The only defense attorney who has made any request to review any of those documents to date has been Mayer's attorney, Melvin D. Kraft, and we did not hear from Mr. Kraft until approximately 4:45 p.m. on October 27, 1976, when he telephoned Joseph F. Lafferty of the Securities and Exchange Commission to make an appointment to review the documents on Friday afternoon, October 29, 1976. On October 29, Mr. Kraft examined the files for approximately two hours, and his associate, Howard Rosen, reviewed those files for approximately four hours. Mr. Rosen returned and continued his

review on Saturday afternoon, October 30, for approximately five hours. On Monday, November 1, Mr. Rosen spent approximately five additional hours completing his review of the documents.

5. During their review Mr. Kraft and Mr. Rosen requested copies of certain documents. Those documents were sent to Commerce Photo-Print Corporation for reproduction on November 1 and 2, 1976. Invoices which we have received from Commerce Photo-Print Corporation indicate that the total number of pages requested by them totalled 2,323, of which 2,287 were delivered to Mr. Kraft on November 4 and the remainder on November 5. Mr. Rosen also requested copies of a small number of additional documents in a telephone call to Mr. Lafferty on November 5, and those materials were ready for him that afternoon.

6. Many of the pages reproduced for Mayer's counsel are SEC registration files, including specifically the Notification under Regulation A Form 1A with exhibits 6, 8 and 9; the Second Post-Effective Amended Notification under Regulation A Form 1A with exhibits 6(a), 6(b) and 6(c); and the Third Post-Effective Amended Notification under Regulation A Form 1A with exhibits. All of those files are public records of the Securities and Exchange Commission.

* * * * *

Government's Memorandum in Opposition to Motion by Defendant Leon Mayer to Dismiss the Indictment

* * * * *

Defendant Leon Mayer has moved to dismiss the indictment on the ground that the Government was not ready for trial on October 10, 1975, when a notice of readiness was filed, within the meaning of Rule 5 of the Southern District Plan for Achieving Prompt Disposition of Criminal Cases. He argues that the Government was not ready then because it had not made available to him at that time all of the third party documents obtained by the Securities and Exchange Commission and the Department of Justice in the investigations of Minute Approved Credit Plan, Inc., and Computer Microdata Corp. He was invited to inspect those documents in a letter from the United States Attorney's Office dated October 19, 1976, almost three weeks before the then scheduled trial date of November 8, 1976, and almost four weeks before the now scheduled trial date of November 15, 1976.

Statement

The circumstances leading up to that October 19, 1976, letter, and the subsequent inspection of the documents by Mayer's attorneys are described in the affidavit of V. Thomas Fryman, Jr., sworn to on November 8, 1976, and submitted in opposition to Mayer's motion.

Argument

THE COURT SHOULD DENY THE MOTION BY DEFENDANT LEON MAYER TO DISMISS THE INDICTMENT

Mayer's claim that the Government failed to complete pretrial discovery by October 10, 1975, is based on a statement in a letter dated May 5, 1975, from his at-

torney to Assistant United States Attorney W. Cullen MacDonald that the prosecution will supply "all the material to which Mr. Mayer is entitled without the necessity of formal motions." He reasons that the Government failed to meet its obligations since he did not get everything then that he has now.

One basic fallacy of Mayer's argument is that it ignores other parts of his attorney's letter which make clear that discovery was proceeding on the basis of the Government responding to demands by his attorney for specific items. An enclosure to that May 5 letter listed four particular types of materials which he wanted produced for inspection and copying. Mayer's attorney in a letter to the Court dated May 13, 1975, described that list as a "schedule of requested items." The May 5 letter and enclosure were attached as exhibit A to the affidavit of Mayer's attorney sworn to on June 27, 1975, and submitted in support of his discovery motion. The "wherefore clause" of that affidavit only requested an order "directing the production of those documents described in the accompanying affidavit [*sic*] of Melvin D. Kraft, pursuant to Rule 16 of the Federal Rules of Criminal Procedure." (p. 4).

The Court in its memorandum and order dated August 5, 1976, found that the Government had complied in almost all respects with those demands at the time the notice of readiness was filed. The Court also held in its earlier memorandum that the Government was not obliged to produce materials to Mayer which he had not requested: "Since the Rule requires a defendant to make a request of the Government before a duty devolves

upon the Government, and since there was no such request, the Court concludes that there can be no duty." (p. 11).*

The absurdity of Mayer's present position is illustrated by his discussion of the SEC registration files. The affidavit in support of his motion notes that the October 19, 1976, letter lists six SEC registration files and continues that there is "much SEC registration material to be analyzed and investigated." (pp. 5-6). The enclosure to the May 5, 1975, letter from Mayer's attorney, however, only specified three individual items in the SEC registration files which he wanted to see: the February 10, 1972, and June 12, 1972, MACP offering circulars and the Fifth Post-Effective Amended Notification under Regulation A. Now he suggests that the Court should dismiss the indictment because the Government did not give him materials such as the Second and Third Post-Effective Amended Notifications which he has now asked to be copied and which he previously indicated that he did not want.

Finally, the affidavit in support of Mayer's motion stresses the time that will be required to study the documents listed in the October 19, 1976, letter. To put it mildly, Mayer's time estimate seems exaggerated. Mayer's attorney and his associate were able to complete a review of all the files in a combined time of approxi-

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* If the Court should desire any further information about discussions between the Government and Mayer's attorney concerning discovery, the Government will submit an affidavit of Assistant United States Attorney W. Cullen MacDonald upon request.

mately 16 hours, and they requested copies of approximately 2,300 pages of documents. Many of the pages copied were SEC filings which they must have known about since the commencement of this proceeding and which have always been available to them as public records of the Securities and Exchange Commission. Such a limited number of documents, which will undoubtedly be refined to a substantially smaller number after a second review, should not offer any obstacle to Mayer's counsel proceeding thoroughly prepared on the date scheduled for commencement of trial.

Conclusion

The Court should deny the motion by defendant Leon Mayer to dismiss the indictment.

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★ U. S. Government Printing Office 1977— 714-017-583

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

V. THOMAS FRYMAN, JR., being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 21st day of April 1977 he served ~~a copy~~ two copies of the within Brief and Appendix by placing the same in a properly postpaid franked envelope addressed:

MELVIN D. KRAFT, P.C.
522 Fifth Avenue
New York, NY 10036

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

V Thomas Fryman, Jr.
V. THOMAS FRYMAN, JR.

Sworn to before me this
21st day of April, 1977

Gloria Meyer
NOTARY PUBLIC

GLORIA MEYER
Notary Public, State of New York
No. 31-0535340
Qualified in New York County
Commission Expires March 30, 1979